IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

E. H. SMITH, D. N. McBRIER, F. B. McBRIER, ALICE M. BETHEL, CHARLES A. OWEN, MORRIS K. RODMAN and ETHEL W. JOHNSTON, for themselves and others similarly situated, *Appellants,*

vs.

BOISE CITY, a Municipal Corporation, and THOMAS F. RODGERS, as City Treasurer of said Boise City, *Appellees.*

APPELLEES' BRIEF

On Appeal from District Court of the United States for District of Idaho, Southern Division

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STRAWN & CO. INC. STATIONERS-PRINTERS, BOISE

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SUBJECT INDEX

TABLE OF CASES

TEXTBOOKS

STATUTES

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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APPELLEES' BRIEF

JURISDICTION

We agree with appellant's statement of jurisdiction of the District Court. This is a suit between non-residents of the State of Idaho, and a municipal corporation, and the officers of such municipal corporation within the State of Idaho, for more than $3000.00, brought in the District of Idaho.

APPELLEES' STATEMENT OF CASE

The Appellants filed suit against Boise City, a municipal corporation, and Thomas F. Rodgers, as City Treasurer of Boise City, to recover for themselves and

others similarly situated for the face value of certain bonds held by appellants and issued by Boise City for improvements in Local Sidewalk and Curb Improvement District No. 38. The complaint of the appellants alleged among other things, the issuance of said bonds, the ownership thereof, and the presentation of the same to the City of Boise for payment and their refusal of such payment. (R. 11-16.) Appellants then allege the negligence and carelessness of Boise City in permitting its former City Clerk, who held the position of Clerk for upwards of 10 years prior to September, 1933, to embezzle large sums of money of the City which included, they allege, large sums of the funds of Local Sidewalk and Curb Improvement District No. 38 (R. 16-17). They further allege negligence of Boise City in permitting inaccurate and insufficient records and an inadequate system of accounting to protect the funds held in trust for the appellants and other bond holders, and because of such negligence generally alleged without specifically naming any detailed fact of negligence, various conclusions of negligence, and prayed for judgment against the City to make a full and true accounting of its statutory duties as trustee, and for payment to the appellants of the full amount of principal and interest of the bonds. (R. 22-25.)

The appellees answered and denied among other things, the amount of the embezzlement alleged by appellants, denied the negligence and carelessness and

wrongful acts of its officers, but admitted that the City Clerk did appropriate to her own use and embezzled large sums of money of Boise City, but denied that she embezzled any funds of Local Sidewalk and Curb Improvement District, No. 38, in excess of $2242.92. (R. 29-32.)

Appellees further denied that the condition of the fund of District No. 38 "can not be ascertained and determined without making a full, true and correct account of any of the accounts of the defendant" and alleged that at said time a full, true and correct account of all the books, records and accounts of this and other Improvement Districts was obtained by the City of Boise at a cost in excess of $30,000, and which disclosed all information desired by the account sought by appellants, and that said account and audit has since its completion, been open and available for use by appellants, their agents or attorneys, and that all the books and records pertaining to this accounting, and the Local Sidewalk and Curb Improvement District, No. 38, are open and available to the appellants, their agents or attorneys. (R. 34-36.) Appellants moved for an order to require an accounting by the appellees and the order was made. (R. 38.) This order was immediately complied with by appellees. (R. 79-83.) Another motion was made for a fuller and more complete account (R. 40) which, without order of the court, was complied with by appellees (R. 84-90). Another request for further particulars

was filed by appellants (R. 41) and all the details and information held by Boise City was submitted to counsel for appellants, and by him prepared. This was submitted as Exhibit "A" (R. 94) to the Second Supplemental Report (R. 90-94) all of which reports contained in detail all of the information and accounting asked for by appellants. Excerpts from the audit mentioned were introduced by appellants after the reports and accounts were entirely made by the appellees. (R. 67.) Thereupon counsel for appellants offered the audit report of Lybrand, Ross Brothers and Montgomery and certain excerpts therefrom were admitted. These excerpts have almost exclusively been generalities as to the manner of keeping the records and books of Boise City (R. 67-76) but do show the summary of special assessments unaccounted for in Sidewalk and Curb Improvement District No. 38 (R. 78). This amount was $3396.19.

The Court entered judgment in favor of Appellants for the sum of $6,846.17. This sum was made up of items as follows:

Difference between amount received and amount paid out	$3,404.50
Amount shown as unaccounted for (embezzled) by City Clerk	2,242.92
Assessments shown on books not certified to county	800.11
Amount marked paid on rolls but no receipts found and money not accounted for	353.16
TOTAL	6,846.17

SUMMARY OF THE ARGUMENT

1. The appellees contend that two methods of procedure are open to bondholders:

(1) By mandate to compel the City to collect the assessments of the bondholders.

(2) The City may be sued for the amount of the assessment made after its officers have collected the same.

Smith v. Boise City, 18 Fed. Supp. 385.

Cruzen v. Boise City, 58 Ida.—74 Pac. 2d 1037.

2. Statutory trusts are not normal trusts and the obligations of the trustee are limited by the restrictions of the statutes.

2 Bogart on Trusts, Sec. 245, p. 833.

Smith v. Boise City, 18 Fed. Supp. 385.

3. Plaintiffs must prove a prima facie case in a suit for an accounting, and the burden of proof is not on the accountant but on those who question the correctness of his accounts.

65 C. J. 906 and 937.

4. The remedy of the bond holders when the taxpayer fails to pay assessments is not against the city nor the improvement district, nor against a person who has paid his assessments, but against the property of the delinquent and the bond holder must pursue the remedy provided by the statute.

Sec. 49-2725, I. C. A.

New First National Bank v. City of Weiser, 30 Idaho 15, 166 Pac. 213.

6 McQuillan Municipal Corporation, page 128, Section 2428.

Richardson v. City of Casper (Wyo.), 45 Pac. 2d 1.

Broad v. Moscow, 15 Ida. 606, 99 Pac. 901.

Bosworth v. Anderson, 47 Ida. 697, 280 Pac. 227, 65 A. L. R. 1372.

5. The bonds of Improvement Districts must be paid in numerical order before the maturity and when there is no objection made by the bond holders. And when so paid the City is not liable.

Sec. 49-2723 I. C. A.

Meyers v. City of Idaho Falls, 52 Idaho 81, 11 Pac. 2d, 623.

New First National Bank of Columbus (Oh.) v. Lindeman, 33 Ida. 704, 198 Pac. 159.

6. When the assessments for special improvements were made, for the life of the bond issue they could not be changed. When delinquencies occurred and more interest was required to pay the bonds because of the city's inability to retire them, no new interest could be added to the roll increasing the burden on taxpayers already paying the tax.

Bosworth v. Anderson, 47 Ida. 697, 280 Pac. 227, 65 A. L. R. 1372.

New First National Bank v. Weiser, 30 Idaho 15, 166 Pac. 213.

7. Penalties charged on delinquencies do not belong to the bond holders. On collection of special assessments the bond holders are only entitled to "and shall recover in addition to the amount of special bonds and interest thereon, 5 per cent, together with costs of such suit including a reasonable sum for attorneys' fees."

Section 49-2725 I. C. A.

Canter v. Lincoln National Life Co. (Ind.), 8 NE 2nd 232.

8. The city is not liable for principal paid on interest.

Bosworth v. Anderson, 47 Ida. 697, 280 Pac. 227.

Moore v. Nampa, C. C. A., 18 Fed. 2d 860 ID; 276 U. S. 536, 48 S. C. 340; 72 L. Ed. 688.

Cagnon v. Butte, 75 Mont. 279, 243 Pac. 1085; 51 A. L. R. 966.

Capitol Heights v. Steiner, 211 Ala. 640, 101 So. 451; 38 A. L. R. 1264.

9. The laches of the bond holders bars any right of action against the city.

Brown-Crummer Investment Company v. City of Burbank, 17 Fed. Supp. 419.

Hammond v. City of Burbank (Calif.), 59 Pac. 2d 495.

Grey v. City of Santa Fe, 15 Fed. Supp. 1074.

Wheeler v. City of Blackfoot, 55 Idaho 599, 45 Pac. 2d 298.

New First National Bank v. Weiser, 30 Ida. 16, 166 Pac. 213.

Richardson v. Casper (Wyo.), 45 Pac. 2d 1.

Bogart on Trusts, Vol. 4, Sec. 964, p. 2791.

I.

ISSUES OF THE CASE

In the decision on the motion to dismiss the district court pointed out very clearly that there were two proceedings open to the bondholders under our statutes. The nature of these two proceedings distinguish these cases in Idaho from those of most other states, and stamp them with a difference as to the rule, both of the accountability of the City and its accountability as a statutory trustee throughout the entire case. As the court stated, in the first place if the city neglects to levy the assessments and pursue the usual and ordinary methods provided by the statute for the collection of the same, the holders of the bonds may compel it to do so by mandate or if it fails and neglects to collect the assessment after levy having been made and the property owners become delinquent in the payment of the installments, the bondholders may foreclose their lien through the court. The second remedy is that—

> "The city may be sued and is liable for the amount of the assessment made for the improvement for which bonds were issued *after* it had by its officers collected the same, for the statute seems clear

> that the city is 'liable for collection of the special assessments made'. The facts alleged do not bring the case under the first remedy, *for complaint is not made of failure of the city to act in levying the assessment and thereafter collecting the same, but it is brought under the second remedy to conserve and apply the assessment already collected by the city through its officer to the payment of the bonds as it alleges that the assessments were made and collected by the officer of the city and by her misappropriated.*" (Emphasis ours.)
>
> Smith v. Boise City, 18 Fed. Supp. 385.

That the court, then, throughout the entire case, treats the question exclusively as one for an accounting of moneys had and received in trust for the bondholders and in no instance as a case having anything to do whatsoever with a failure to comply with any other statutory duty.

In the appellants' brief it appears that they have not been content to stay within these bounds as alleged by their complaint as observed by the court, but further contend that in addition to the liability for embezzlement that the rule of the court applies to the city to require full responsibility of the city to provide the loss sustained by reason of the failure of taxpayers to pay their assessments. All of these liabilities claimed are outside the facts of the issues of this case as pointed out by the court, except such sums as have been shown to have been actually received by Boise City.

The defense of the appellees was set up based upon this theory. But the appellants, contrary to the principle thus announced, endeavor by ingenious argument, by evasion of the burden of proof to make a prima facie case, as will be hereafter pointed out, by endeavoring to divert the court's attention from their own laxity, negligence and laches in failing to protect their own interest as was their duty, to hold the city and its taxpayers *generally* liable and reach a purse more solvent than the improvement district upon which the security was based, and recover on their bonds for matters, which, under the court's ruling could not be and were not raised as issues of this case.

II.

ACCOUNTING MADE BY CITY

Appellants attempt to make it appear that the city's accounting is incomplete, partial and fragmentary, but such is not the case as the record shows. On or about September 8, 1937, motion was filed by appellants asking that an order be made requiring defendants to make a full and true accounting of their acts showing

(a) Assessments levied
(b) The collection made
(c) The amount paid out for principal and interest
(d) Amount of assessments, penalties and interest cancelled or rebated
(e) Amount certified to Ada County for collections

(f) The amount received from Ada County

(g) The amount embezzled or otherwise wrongfully appropriated, the allocation of the amount recovered on the bond of the City Clerk

(h) The allocation of the $14,500.00 collected by Boise City on the bonds of the City Clerk (R. 37).

On October 2nd, an order was made requiring the defendants to make such showing. Pursuant thereto the defendants made their report and account. This showed exactly what the plaintiffs asked for and what the court ordered, to-wit:

(a)	Assessments levied	$56,493.62
	Interest levied	21,750.25
(b)	Collections made	
	City Clerk	31,060.27
	From Ada County	23,816.24
(c)	Amount paid out for principal and interest	
	As principal	19,539.10
	As interest	31,932.88

(d) That the records show no rebate or cancellations of assessments, penalties or interest.

(e) Amount certified to Ada County. This shows 10 installment certifications although the date isn't attached. It is later shown by the second

supplemental account to have begun in 1922 and totals..... 49,470.93

(f) Amount received from Ada County from each such certification, totals.... 21,672.40
With subsequent items paid each year to 1937 making a grand total from Ada County of..... 23,816.24

(g) Refers to the only information available charged to the Angela Hopper embezzlement, the sum of.. 2,242.92
and two other items showed as
(1) unpaid and overdue and not certified to Ada County..... 800.11
(2) Marked paid on rolls in excess of amount of duplicate receipts 353.16

(h) That the $14,500 were being held in a special suspension fund to be kept and maintained for judicial determination of the owners thereof. (R. 79-83.)

Thereafter at the request of the appellants without an order of the court the appellees furnished a supplemental report and account containing excerpts from the audit report of Lybrand, Ross Bros. and Montgomery and of the records of Ada County as far as said Boise City has been able to go in obtaining said records. (R. 84-90.) No attempt was made to

fully audit the records of Ada County pertaining to delinquencies in this improvement district because such records are open to the bondholders in their own interest and because Boise City, in its own right, had no power or authority to require an accounting of these funds from Ada County. (See: Haydn v. Douglas County, 170 Fed. 24.) The records in the supplemental account show simply the condition of the delinquent improvement district assessments against the particular property from the years 1928 to 1931, inclusive, and the disposition of said property during that time. (The details of these are all omitted in the statement of evidence on appeal.) This indicates that there remains unsold on the records of Ada County lands on which delinquencies in the sum of $195.16 for those four years, which, under the authorities, the appellants have the exclusive right to pursue in their own behalf for foreclosure of all the liens against this property.

On the day this case was set for trial the plaintiffs filed what they termed OBJECTIONS TO REPORT AND REQUEST FOR FURTHER PARTICULARS (R. 41), such objection to the supplemental report was only that it was incomplete. Prior to this time, all the records in possession of Boise City, and the accounts of improvement district No. 38, were submitted to counsel for plaintiffs including this Lybrand, Ross Bros. and Montgomery audit with the request that he prepare from this material all the mat-

ter that he desired to be presented in this case, informing him that we were submitting all of the information we had, in a report and account in order that the court might have before it the full and complete details of the condition of the funds. Counsel for plaintiffs thereupon prepared Exhibit "A" to Second Supplemental Account (R. 95), which was submitted by the defendants as their second supplemental report and account in identically the same form as prepared by counsel for the appellant, with the exception of certain minor corrections. When appellants rested there had been no proof submitted of the payment of any bonds by the City, nor the collection of any of the funds by the City and at that time all of such accounts having been filed for record in this case, defendants offered as evidence, and as exhibits 1, 2 and 3, respectively, the report and account (R. 79), the supplemental report and account (R. 84), and the second supplemental report and account (R. 90), as truly showing the contents of the records of Boise City with reference to Improvement District No. 38, and these were admitted without objection.

In this second supplemental report, a showing is made that it is impossible to determine the tax sales and conveyances to and from Ada County, prior to the year 1928 and subsequent to the year 1931. That such information is not contained upon the records of Boise City, but is a part of the records of Ada County, and that with this statement the City of Boise has fur-

nished all the facts pertaining to Improvement District No. 38 that it is possible for it to furnish.

Since the presumption prevails in favor of the trustee's honest exercise of his discretion and since the burden of proof is not on the accountant or the trustee but upon those who question the correctness of his accounts as set out in the text, 65 C. J. 937, and since in all of these accounts, they in detail show completely all amounts levied for the payment of said bonds, the amounts collected and the amounts delinquent, and that since no objection or other evidence has been introduced by the plaintiffs to contradict this or to question its legality, how can anyone be heard to say that defendants have not made a full and complete account?

Under the first account two items are set up of amounts provided for payment of principal of the bonds. The assessment levied was $56,493.62. The ledger account at the City Clerk's office shows $56,639.16, the latter amount being the exact amount of the principal of the bonds. Appellants contend that for this difference of $45.48, the appellees are liable, but let us examine the accounts to determine this. It is true that the original assessment roll was for $56,493.62, but the record also shows the following:

Received by the City Clerk	$31,060.27
Certified to the County	49,470.93
Total	$80,531.20

The amount of interest levied which was fully sufficient to pay all interest accounts on the bonds had the assessments been paid promptly was $21,750.25, or a total of $78,243.87, providing for principal and interest. This left a balance to apply on either interest or principal, which was actually levied, of $2,387.33, concededly considerably more than enough to take up the $45.48. The $14,500 recovered by the City on the Clerk's bonds were recovered on the general bonds, and had nothing to do with the special improvement district funds whatsoever. No action was taken by the District Court concerning this money, and no error is claimed by appellant.

III.

STATUTORY TRUSTS ARE NOT NORMAL TRUSTS

Considerable comment has been made concerning the various accounts that have been made by the appellees. We desire to call the court's attention to the fact that in the first place all of the records of Boise City are public records to which the appellants have had, since the time they purchased their bonds, full and complete access. In our answer (R. 34) we particularly set out and alleged the audit of Boise City by Lybrand, Ross Bros. and Montgomery, from which excerpts were admitted in evidence as presented by the appellant (R. 65-79), and in our answer further we stated "that said account and audit is now and at all

times since the completion thereof, and long time prior to the commencement of this action, has been open and available for use by plaintiffs, their agents, servants or attorneys, and that all the books, records and accounts in connection with Local Sidewalk and Curb Improvement District No. 38 in possession and custody of the appellees are now open and available for inspection by appellants, their agents, servants or attorneys." (R. 35.)

At 65 C. J., page 883, it is stated:

> "Where the trustee has at all times kept his records open for inspection and has furnished his accounts to a beneficiary for examination and inspection, fully and freely affording every opportunity for information, a beneficiary receiving such full disclosures and opportunity to investigate has no right to vex and harrass the trustee by demanding an accounting."

We submit to the court that where a public body is designated a statutory trustee and the rights and liabilities of the trustee are prescribed by the statute it is then that the general rules regarding trustees do not apply but are limited by the provisions of the laws creating this trusteeship, and because of the fact that this relationship is not only created by statute but that the rights of the parties are specifically defined, these statutes must be considered to determine the obligations which this trustee owes to its cestui que trust.

In volume 2 of Bogart on Trusts, Sec. 245, page 833, it is said:

> "Some of the American statutes referred to above not merely create or provide for the creation of trusts, but also give some details as to the method of execution of the funds, accountings and termination. To this extent these statutory trusts are not normal trusts, and the general principles herein do not apply to them."

(See also court's opinion, R. 47.)

The question of whether under the statutes of the State of Idaho a city may become liable generally in in tort action because of negligence of the officers of the city, in performing their duties under the improvement district code, is no longer open to question. In Broad v. City of Moscow, 15 Idaho 606, 99 Pac. 101, decided 28 years ago, it was held that those provisions of the statute which we have referred to above and which carefully eliminate any claim against the city in connection with the debt created by the bonds and which further provide two distinct remedies to the bondholders in case of neglect or refusal of the city officials to perform their duties, renders the city immune from a general judgment based upon a tort action. In affirming the judgment the Supreme Court reviewed the authorities at length and followed the doctrine announced in those cases holding the city not liable for the negligence of its officers. After quoting at length from City of Pontiac vs. Talbot Paving Com-

pany, 94 Fed. 65, and German-American Savings Bank v. City of Spokane, Washington, 47 Pac. 1103, 49 Pac. 542, 38 L. R. A. 259, the court said:

> "If the plaintiff could maintain this action for damages, because the officers of the defendant failed to do their duty, then an indebtedness might be created against the city, which the statute says must be raised by special assessments, only, against the property benefitted. In other words, if this suit can be maintained, then the plaintiff has done indirectly what the statute says cannot be done directly, and the mere fact that the officers have failed to do their duty and the plaintiff has taken no steps to compel them to do that which they have agreed to do, and which they are authorized to do under the statute, will not give him the further remedy of subjecting the city to damages by reason of the fact that they have not performed their duty. * * * "

> "If a general judgment could be obtained against the city, then to the extent of such judgment there would be an increased debt above the expense of the improvement which the property must pay. We think it clearly appears from the entire act that the legislature intended to inhibit the creation of any municipal indebtedness and to limit all claims for such improvement to the property affected. From this discussion it follows that the failure of the city to pay the contract price,

> either in cash or bonds, would not subject the city to damages, but the contractor or bondholder would be relegated to the remedy clearly indicated by the statute of an action to compel the officers of such city or village to perform such duty, as the act requires. We are therefore of the opinion that the judgment of the trial court was right."

IV.

PLAINTIFF MUST PROVE PRIMA FACIE CASE

An examination of the statutes will show the duties which rest upon the trustee. In the first place, however, it is elementary that to have a standing in court at all the cestui must show some interest in the trust. In 65 C. J., page 906, it is said:

> "In an action for an accounting against a trustee, plaintiff has the burden of proving the existence of a trust, and ordinarily the receipt by the trustee of some property impressed with the trust, and, under some circumstances, the amount of the property so received."

It was not shown by the plaintiffs in any stage of the proceeding that the appellees-trustees had received any property impressed with the trust, nor the amount thereof. From the very beginning of this case, appellants have proceeded upon the erroneous idea that they had no burden of proof, that the mere unsupported

allegations of their complaint were sufficient to shift the burden of proof to the appellee. We apprehend, however, that the above mentioned requisite on the part of the plaintiff, that the interest of a pretended cestui que trust in a trust estate must be proved by the cestui before even a prima facie showing is made, and many of the cases go so far as to require the showing by the cestui that actual funds have been received by the municipality before a cause of action is stated.

In 65 C. J., page 937, it is stated:

> "In proceedings for stating and settling the accounts of trustees, all proper presumptions will be indulged, and every presumption is in favor of the trustee's honest exercise of his discretion. On this question the burden of proof is not on the accountant, but on those who question the correctness of his accounts."

At the top of page 33 of appellants' brief, a quotation is made from Bogart on Trusts, Section 963, and an omission indicated at the end of the first paragraph. We desire to quote that omission which appellant evidently intentionally omitted:

> "*It lies within the discretion of the Court if there is no relevant statute,* to order an account of the trustee or his successor in interest, at the suit of any interested party, at such time as seems reasonable to the court in view of the time which

has elapsed since the last account and the *nature and status of the particular trust.*" (Italics ours.)

Referring to the statutes hereafter mentioned, the complaint only states facts charging the appellees with responsibility for moneys actually collected, and since the decision of the State Supreme Court in the case of Cruzen v. Boise City, Idaho, 74 Pac. 2d, 1037, this seems to be the settled rule of the law in this State. That case, however, involved exclusively a question of liability of the City for funds collected by it and embezzled by the City Clerk, and had absolutely nothing to do with the liability of the City for any other reason, falling squarely in line with the decision of the District Court in this case.

V.

THE STATUTES WHICH DEFINE AND LIMIT THE TRUST

According to the evidence admitted in this case through the introduction of the bond attached to the petition, and the allegations of paragraph IV of the petition, the improvement district was created pursuant to the provisions of Article 3 and Article 6 of Chapter 163 of the Idaho Compiled Statutes in 1919. Since no complaint was made of the failure to levy sufficient assessments in said complaint no evidence was introduced by either party with respect thereto, nor were the ordinances creating the improvement district

ever introduced or presented to the court for the reason that no question thereon was raised. Referring, therefore, to the procedural part of the statute contained in Article 6 of Chapter 163, which now appears as Chapter 27 of Title 49 of the Idaho Code Annotated. It will be observed that Section 49-2715, Idaho Code Annotated, which was Section 4013 C. S., provides the method of collection thereof. Section 49-2716 I. C. A., the same as Sec. 4014 C. S., provides for the issuance of bonds to cover the expenses of the improvement instead of levying the entire tax at one time. Section 49-2718 I. C. A., the same as 4016 C. S., prescribes the limitations of the bond issue. That following Section 49-2719 I. C. A., the same as 4017 C. S., provides as follows:

> "ANNUAL TAX LEVY FOR INSTALLMENTS AND INTEREST.—When district bonds are issued under this chapter for improvements, the cost of which is by law charged by special assessment against specific property, the mayor and council, or trustees, or other authorized officer, board or body, shall levy special assessments each year sufficient to redeem the instalment of such bonds next thereafter maturing, but in computing the amount of special assessments to be levied against each piece of property liable therefor, the interest due on said bonds at the maturity of the next instalment shall be included. Such assessments shall be made upon the prop-

erty chargeable for the cost of such improvements, respectively, and shall be levied and collected in the same manner as may be provided by law for the levy and collection of special assessments for such improvements where no bonds are issued, except as otherwise provided by this section. But the basis of such assessment, whether upon such assessed valuation, frontage, or otherwise liable for such costs, shall be retained for the assessment of suceeding instalments of said bonds."

Section 49-2720 I. C. A., or C. S. 4018, prescribes the form of bonds. Section 49-2721 I. C. A., which is the same as C. S. 4019, provides as follows:

"PAYMENT OF INSTALMENTS BY OWNER.—The owner of any piece of property liable for any special assessments may redeem his property from such liability by paying the entire assessment chargeable against his property, upon the municipal clerk having published a printed notice in the official newspaper of the municipality for ten consecutive days, or three weekly issues, which notice shall state the time for payment to begin and the time for payment to close, the last day of said notice to be not less than thirty days before the issuance of the bonds, or, after the issuance of the bonds, by paying all the instalments of the assessments which have been levied and also the amount of the unlevied instalments with interest on the latter at the rate pro-

vided in the bonds from the date of the issuance of the bonds to the time of the maturity of the last instalment. In all cases where instalments of the assessments are not yet levied and paid as above provided, whether before or after the issuance of the bonds, the same shall be paid to the clerk, who shall receipt therefor, and all sums so paid shall be applied solely to the payment of the cost and expenses of such improvements or the redemption of the bonds issued therefor.

"When any piece of property has been redeemed from liability for the costs of any improvements herein provided, such property shall not thereafter be liable for further special assessments for the cost of such improvements except as hereinafter provided."

Section 49-2713 I. C. A., which is the same as 4021 C. S., provides as follows:

"PAYMENT OF BONDS * * DUTIES OF TREASURER. — The funds arising by such assessment shall be applied solely toward the redemption of said bonds.

"The city treasurer or other authorized officer of such municipality shall pay the interest on the bonds authorized to be issued by this chapter out of the respective local improvement funds from which they are payable. Whenever there shall be sufficient money in any local improvement fund

against which bonds have been issued under the provisions of this chapter, *over and above the amount sufficient for the payment of interest on all unpaid bonds to pay the principal of one or more bonds, the treasurer shall call in and pay such bonds,* which shall be called and paid in their numerical order: provided, that such call shall be made by publication in the city official newspaper on the day following the delinquency of any instalment of the assessment or as soon thereafter as practicable and shall state that bonds No..... (giving the serial number or numbers of the bonds called) will be paid on the day the next interest coupons on said bonds shall become due, and interest upon said bonds shall cease upon such date." (Italics ours.)

Section 49-2725 I. C. A., which is the same as Sec. 4023 C. S., provides as follows:

"BONDHOLDERS' RIGHTS AND REMEDIES. — *Said bonds,* when issued to the contractor constructing the improvements in payment thereof, or *when sold as above provided, shall transfer to the* contractor, or other owner or *holder, all the right and interest of such municipality in and with respect to every such assessment, and the lien thereby created against the property of such owners assessed as shall have not availed themselves of the provisions of this chapter in regard to the redemption of their property*

as aforesaid, shall authorize said contractor and his assigns, and the owners and holders of said bonds to receive, sue for and collect, or have collected such assessment embraced in any such bond or through any of the methods provided by law for the collection of assessments for local improvements.

"And if the municipality shall fail, neglect or refuse to pay said bonds, or to promptly collect any of such assessments when due, the owner of any such bonds may proceed in his own name to collect such assessments and foreclose any lien thereon in any court of competent jurisdiction, and shall recover, in addition to the amount of such bonds and interest thereon, five per cent, together with costs of such suit including a reasonable sum for attorney's fees.

"Any number of the holders of such bonds for any single improvement may join as plaintiff, and any number of holders of the property on which the same are a lien may be joined as defendants in such suit.

"And such bonds shall be equal liens upon the property for the assessments represented by such bonds without priority of one over another to the extent of the several assessments against the several lots and parcels of land." (Italics ours.)

It is our contention that this statute bars the appellants from recovering against the City personally, the

amount which it has not collected, but requires the bondholders to take action in their own names, to protect their own interest by proceeding against the property.

In volume 6, McQuillan, page 128, Section 2428, it is said:

> "Mandamus or mandatory injunction to compel the collection and payment over of the special assessment, except that in the federal courts mandamus does not lie as an original proceeding. However, the holder of improvement bonds cannot bring mandamus against the municipality to compel the payment of the bonds where there is an adequate remedy at law."

In the case of New First National Bank v. City of Weiser, 30 Idaho 16, 166 Pac. 213, in construing the same act, the court said:

> "The remedy of the bond holder in case a property owner fails to make payment of the taxes assessed against his property, is not against the city nor the improvement district, nor against a person who has paid the sum due from him, but against the property of the delinquent. Under said act the plaintiffs have a plain, speedy and adequate remedy at law for the collection of any interest or principal due from any property owner who has failed to pay the assessments made by the City authorities and that being true a writ of

mandate will not issue. The bondholder must pursue the remedy provided by statute."

When these bonds were issued that holding was the declared law of the state, of which the appellants were charged with notice. Thus there appears another limitation on the trustee responsibility to the bondholders and this limit is specifically based upon the *failure, neglect* or *refusal* of *the city* to pay the bonds, thus based upon a tortious action of a municipality in its collection, a failure which is usually covered by general rules of law in accountings of trusteeships. Our legislature has therefore defined the policy and the limits of relationship of the parties.

In Richardson v. City of Casper (Wyo.), 45 Pac. 2d, 1, on the question of liability of the city for failure, refusal or neglect to collect the assessments, the court cited with approval the case of New First National Bank v. Weiser, (supra), and comments on the similarity of our statutes, then says:

> "It was held in the case last cited that the statute giving the right to bondholders to enforce assessments themselves gives them a plain, speedy and adequate remedy, which is exclusive, and no recourse against the city is available. In Broad v. City of Moscow, 15 Ida. 606, 99 Pac. 101; Gagnon v. City of Butte, 75 Mont. 279, 243 Pac. 1085, 51 A. L. R. 966; and Moroney v. Surety Co., 168 Okla. 69, 31 Pac. 2d 926, it was held that the City could not be held liable for failure to

collect or for negligence in collecting assessments. * * * In the case at bar there is not only a contractual limitation of, but also a statutory one. In such case no duty of diligence can be implied, at least in so far as the legislature has given a direct means of relief on the part of the bondholders, and at least in so far as liability for tort is concerned. *Cases involving merely contractual limitation of liability stand on a different footing from those in which an act of the legislature must be considered.* In the former, no public policy of non-liability is involved. In the latter there is. In this state, the legislature has spoken unequivocally and emphatically. Plaintiff is charged with knowledge thereof. We cannot give him any relief herein without holding that the legislature has no right to establish a public policy to the contrary. We do not see how we can do that." (Emphasis ours.)

Section 49-2728, I. C. A., which was C. S. Sec. 4026, is the statute which purports to limit the liability of the municipality except for the collection made. This statute provides:

"The holder of any bond issued under the authority of the Article shall have no claim therefor against the municipality by which the same is issued in any event, *except for the collection of the special assessment made* for the improvement for which said bond was issued, but his remedy in

case of non-payment shall be *confined* to the enforcement of such assessments." (Emphasis ours.)

VI.

BONDS ARE PAYABLE IN NUMERICAL ORDER BEFORE MATURITY

Appellees contend that the fund created by statute for the payment of the improvement bonds should have been pro-rated from the very first and that if the City pays bonds in their numerical order prior to the maturity of the bonds, it is liable for the deficiencies after maturity when the fund is insufficient to pay the principal and interest of the outstanding bonds. We have pointed out above, the statute, to-wit: 49-2723, I. C. A., which provides that the City Treasurer, or other authorized officer,

> "shall pay the interest on the bonds authorized to be issued by this chapter out of the respective local improvement funds from which they are payable. Whenever there shall be sufficient money in any local improvement fund against which bonds have been issued under the provisions of this chapter over and above the amount sufficient for the payment of interest on all unpaid *bonds to pay the principal of one or more bonds, the treasurer shall call in and pay such bonds, which shall be called and paid in their numerical order.*"

This question was the subject of litigation in the case of Meyers vs. City of Idaho Falls, 52 Ida. 81, 11 Pac. 2d 626. In this case the court was called upon to determine whether or not the bonds, *after their maturity date,* should share pro-rata in the deficiency amounts on hand or whether at that time they should be paid in their numerical order. The question was not raised in that case nor in any case cited by appellant as to any City liability for having paid bonds in accordance with the statute prior to maturity, but the court construed the statutes particularly the last paragraph of Section 49-2725 I. C. A., the same as C. S. 4023, which provides for equal liens upon the property by the bondholders. In the Meyers case, with respect to payment before maturity, it is said:

> "We believe that the legislature only intended by the numerical priority clause to provide an orderly method of retiring the bonds, and for the stoppage of interest, and that it did not thereby intend to destroy the equal, joint estate of all of the bondholders in the lien of the bonds. *In the absence of objection* and so long as that equal, joint estate of all of the bondholders is not jeopardized, the city officials are authorized and required to pay off the bonds in their numerical order as required by statute. By so doing, the equal line of all the bonds is not denied, but a method of orderly payment is provided which will prevail under ordi-

nary circumstances. When, however, as in this case (and we confine this decision to these immediate facts), certain of the bonds remain unpaid *after the maturity of the entire issue,* and the remaining security has been obliterated on account of non-payment of general taxes and consequent loss of the assessed property, the lien of all unpaid bonds will attach equally upon all funds in the hands of the city treasurer belonging to the particular district, and the treasurer must pay them out *pro rata,* and not in numerical order. *The fact that other bondholders may have theretofore been paid in the orderly carrying out of the numerical priority clause without objection does not alter the situation."* (Italics ours.)

This case also quotes from the case of New First National Bank of Columbus, Ohio, v. Linderman, 33 Ida. 704, 198 Pac. 159, at 161, where this language is found:

> "The bond holders look primarily to the local improvement district fund for the payment; first of all interest due, then of the matured bonds themselves, in numerical order, as far as the money collected will go."

And the court in the Meyers case remarked concerning it:

> "The bonds were not yet due and the remaining security had not been exhausted, these facts mark-

ing the difference between that case and the one we are considering."

This is squarely in point against appellants' contentions.

In payment of $19,539.10 on principal in the manner directed by the Legislature herein prior to maturity the City complied with these decisions and the statutes. There was no objection from the bondholders and no act on their part to foreclose this lien. Here is another place where the statute determines and limits the trust relationship. The appellants had the legal right to enforce the assessments. How could the city know they were not going to exercise them? The city cannot be liable if they do not.

VII.

WHEN THE ASSESSMENTS WERE FIRST FIXED THEY COULD NOT BE CHANGED FOR THE LIFE OF THE BOND

Appellants in their endeavor to reach the purse strings of Boise City, insist that the City is responsible for its failure to levy additional interest each year when the delinquencies occurred, so as to make payment of interest on bonds which could not be retired as anticipated, because of the delinquencies. We submit that the delinquencies were not the fault of Boise City. That it was entitled to anticipate the payments

of the amounts of the assessments and anticipating those payments it was not authorized to fix the interest higher than the computed amount to retire the bonds with interest as the instalments came in. It is a settled rule of law that during the life of the bond issue when it is once fixed the assessments were fixed and could not be changed.

In Bosworth v. Anderson, 47 Ida. 697, 280 Pac. 227, 65 A. L. R. 1372, acting on this exact point, the court says:

> "This assessment became the basis as to the individual property owner of the charge on his land indicative of the benefits accrued to him and fixed the amount of the lien against his land and it would have to be paid on such unit to redeem his land from the obligation of the bonds. This unit as to the bondholders contained the definition of their security because, while the bonds were obligations secured by all the lands in the district, in order to enforce their security, foreclosure would be necessary against each particular piece of land in the district to the amount of liability thereon, theretofore determined by the only body authorized to act, namely, the city council. *Therefore for the life of the bond issue, the units of assessment were fixed and* could not be changed. C. S. Sec. 4017." (Emphasis ours.)

This principle is upheld and insisted upon in the case of New First National Bank v. Weiser, 30 Ida. 15, 166 Pac. 213. The court there said:

> "Such taxpayer has cleared himself from all liability on account of the bond issue, or in proportion to the time he has paid, that is to say, if he has paid up his assessments for three years, he has discharged that proportional part of his share of the bonded indebtedness, and the city authorities would have no right to divert any portion of the principal and interest paid by such taxpayer to the payment of the interest and principal on such bonds owed by a delinquent taxpayer."

The court further said that:

> "If the bondholder sees fit to proceed in the manner provided by statute, he can either secure his money from the delinquent taxpayer or obtain title to the property of such taxpayer free and clear of all encumbrance."

Certainly it will not be contended that after the assessment roll was fixed by the City Council that the City Clerk had any authority to change it. To change it so as to increase the interest assessments as contended for by the appellants, would be simply to transfer the delinquencies from people failing to pay their taxes and by building them up, as additional interest, obtain the amounts from those who do pay their taxes. It has been seen throughout the great economic depression

through which we have passed that this has often happened. The faithful taxpayer has been the one who has carried the burden of government while the delinquent taxpayer has been permitted every concession and every extension and moratorium which legally could be given to him. As pointed out in the above case, when a taxpayer determines the amount levied against his property, both principal and interest, he has the right, and was given it in this district, to pay the amount in a lump sum, or he may pay it in installments, and if he pays it in installments he should be required to pay no more than his proportion of the original roll regardless of whether all the rest were delinquent or none were delinquent. Why should he be penalized because of the default of his neighbor who was under the same obligation? Here again the enforcement of this obligation was a burden placed on the bondholders, not the City. By speedy foreclosure their rights could have been protected. Therefore the appellants cannot be permitted to exact any of these amounts from the City.

VIII.

PENALTIES CHARGED ON DELINQUENCIES DO NOT BELONG TO THE BONDHOLDERS

Appellants contend that a penalty of 10 per cent when taxes become delinquent, should be charged

against the City because of its failure to certify this 10 per cent delinquency item to the County.

In the case of Canter v. Lincoln National Life Co., Ind., 8 N. E. 2d 232, the court, on an exact situation, held:

> "Statutory penalties imposed because of delinquencies in payment of principal and interest on improvement bonds do not in absence of statutory authorization belong to bond holders."

Counsel has not pointed out and we have been unable to find any statute requiring these penalties to go into the bond redemption fund. For this reason there can be no liability, and the further reason that the responsibility was not on the City but on the bondholder as above pointed out. Even if it were chargeable it was against the land as part of the assessment available by foreclosure by the bondholder.

IX.

THE CITY IS NOT LIABLE FOR PRINCIPAL PAID ON INTEREST

The appellants ask for the difference in the amount of interest levied and the amount which it paid, which is approximately $10,034.14, claiming that the city should be charged with this deficiency because it failed to levy the additional sum. As above pointed out, we think that such is not the law either under any trust

theory or the statute. The case of Bosworth v. Anderson, 47 Ida. 697, 280 Pac. 227, passed on this matter specifically, and in that case the court said:

> "The city of Rexburg collected $17,121 to be applied in the payment of principal of the bonds, but instead used this sum to pay interest. The appellant here contends that the City by thus diverting these funds became liable therefor, because of the violation of its duty as collection agent. This court has previously held contrary to appellant's contention in this regard. Broad v. Moscow, 15 Ida. 606, 99 Pac. 101, and this case has been cited and construed in numerous instances to the same effect.
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> Moore v. Nampa (C. C. A.), 18 F. 2d 860; Id., 276 U. S. 536, 48 S. ct. 340, 72 L. Ed. 688.
>
> Gagnon v. Butte, 75 Mont. 279, 243 Pac. 1085, 51 A. L. R. 966, note.
>
> See, also, Capitol Heights v. Steiner, 211 Ala. 640, 101 S. 451, 38 A. L. R. 1264, note."
>
> And see Richardson v. City of Casper (Wyo.), 45 P. 2d 1, which cites with approval the Bosworth v. Anderson case and holds that the City is not liable for paying principal on interest.

As above noted, the bondholders were charged with notice of the first delinquencies and it was their duty to protect their interest therein. Since the legal rights to assessment by express provisions of the statute, was

in the bondholder and not in the City, the reason is clear why our courts have refused to charge cities in these cases, with anything except for the safe keeping and application of the funds actually received and that no further liability exists. Any other responsibility is specially placed in the hands of the cestui, the bondholders, in order that they may, as stated in the Weiser case, have a plain, speedy and adequate remedy at law for their protection.

X.

THE LACHES OF THE BONDHOLDERS BARS ANY RIGHT OF ACTION AGAINST THE CITY

It will be observed from exhibit "A", to the second supplemental account (R. 94), that on the very first instalment there was a delinquency in taxes paid of $4,364.48. Of this delinquency and the subsequent proportionate delinquencies, the bondholders were charged with notice. To them were transferred "all the right and interest of such municipality, in and with respect to every such assessment and the lien thereby created against the property of such owners," (Sec. 49-2725 I. C. A., Sec. 4023 C. S.). They could have and are the only ones who could have, from the period of that first delinquency, enforced their rights as against the property, but instead of doing that they have stood supinely by, slept on their rights, watched the entire proceeding, fully charged with knowledge

of the condition and of the responsibility of learning the conditions, for these 16 years from the first delinquency and now say that the City of Boise violated its sacred trust and thus became obligated to them in the amounts that it didn't collect. In the case of Brown-Crummer Investment Co. v. City of Burbank, 17 Fed. Supp. 419, the court had a similar case before it and very pertinently remarked:

> "A bondholder, from the period of first delinquencies, at the end of every fiscal year could have enforced his right to require the tax collector to make the demand and also to require the council to levy the tax. He should not in equity be permitted to lie dormant in this respect for more than two years and then, when a great economic depression and real estate inactivity appears take action to require the tax collection agencies of the City to function."

And in Hammond v. City of Burbank, the Supreme Court of California, in 59 Pac. 2d, 495, at 503, had the following to state:

> "It would be quite unfair to the taxpayers of Burbank to permit the petitioners to set back for eight or nine years and allow surplusses, that under this theory should have been transferred to the bond redemption fund, to be consumed in later years for other purposes, and then compel the city this year to raise by general taxation the total

amount of such surplusses so consumed. The petitioners have slept on their rights for these many years and their laches bars them from this relief at this late date."

In Gray v. City of Santa Fe, 15 Fed. Supp. 1074, on the same subject the court said:

"In view of the existence of a valid and enforceable lien against the abutting property, the absence of any diversion of funds available for payment of the bonds, the absence of any act on the part of the city which caused or contributed to the cause of the asserted deficit in the amount of the uncollected assessments to pay the outstanding bonds, the right of plaintiffs to maintain foreclosure suits in their own name or to mandamus the city to compel enforcement of such liens, it would violate every dictate of the general policy under which special obligations of this kind are widely issued to subject the municipality to a personal judgment for the full amount of such bonds. Powell v. City of Ada, (Okla.) (C. C. A.), 61 Fed. 283; Blanchar v. City of Casper (C. C. A.), 81 Fed. 452; Capitol Heights v. Steiner, 211 Ala. 640, 101 So. 451, 38 A. L. R. 1264; Gagnon v. City of Butte, 75 Mont. 279, 243 Pac. 1085, 51 A. L. R. 966, and cases collated in the appended notes."

On the question of the appellants being charged with

notice of the conditions of the funds we call attention to the case of Wheeler v. City of Blackfoot, 55 Ida. 599, 45 Pac. 2d, 298. In that case, in order to meet an instalment in payment of improvement bonds, the City Council transferred in February, 1919, some $8000.00 from the general fund to the special improvement fund and did not withdraw the same until September, 1926, one day before maturity of the remaining bonds, and the court held that since this advancement was made nine years before the maturity of the bonds and resulted in there being sufficient money at all times to retire the bonds and coupons as they matured, there was no reason during those years for the holders of unmatured bonds to exercise any such diligence in urging the collection of unpaid and delinquent assessments against any of the property in the district. Thus conclusively holding that the bondholders were charged with notice of the condition of the fund. In beginning the consideration of the case they stated as follows:

> "Here a loss must be suffered by someone. The loss must fall either upon the general fund of the City of Blackfoot, which means, in the finish, the taxpayers of the City, or else it must be borne by the owners of the improvement district bonds. We are therefore confronted with the question: Upon whom should this loss fall; or in other words, which of the parties litigant stands in the most favorable position to merit consideration in the present case?"

If the same rule is applied in this case, which we apprehend it will be, the court cannot ignore the laches and negligence of the bondholders themselves in failing to protect their interests and the rights held by them to the assessments themselves, in which the City had absolutely no interest, and upon which it was charged only with the collection or receiving of. When the delinquencies occurred there was no duty and we contend no right in the City, since it did not even hold the legal title to the liens or cash assessments, to foreclose any of them. See: New First Nat. Bank v. Weiser, supra, Richardson v. Casper (Wyo.), 45 Pac. 2d, 49-2725 I. C. A., C. S.

In Bogart on Trusts, Vol. 4, Sec. 964, page 2791, he lays down the rule as follows:

> "Long delay and laches with change of condition of trustee leads court to deny cestuis right to accounting."

CONCLUSION

As clearly stated by the District Court, the case is one solely "to conserve and apply the amount already collected by the City" and the plaintiff should not be permitted, by any theory or right, to extend that liability for any reason beyond this limit, and we submit to the court that if these rules are followed as prescribed by the statutes of this state as the State Supreme Court has defined them on statutory trusts, there

can be no more recovered in this action, than the court below allowed. Judgment should be affirmed.

Respectfully submitted,

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Service of the foregoing brief acknowledged this .....day of November, 1938.

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